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No. 07-1074

In The Supreme Court of the United States

Robert Stewart, as Chief of the South Carolina Law Enforcement Division, Henry McMaster, as Attorney General of the State of South Carolina and Ralph Hoisington, as Solicitor of the Ninth Judicial Circuit,
Petitioners,

vs.

Jimmy Martin and Lucky Strike, LLC,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The brief in opposition filed by Respondents Martin and Lucky Strike, LLC., while long on language restating its position that the Fourth Circuit correctly decided this case, provides no effective response to Petitioners' compelling showing that certiorari is warranted.

I. Immediate Review Is Necessary Because The Majority Failed To Apply The Correct Legal Standard For Burford Abstention, Leaving The State's Longstanding Gambling Forfeiture Statutes Under A Cloud Of Uncertainty In Federal Court.

Contrary to Respondents' contentions, and the majority's reasoning, this case is the consummate one for abstention under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). In reversing the District Court's abstention under *Burford*, the majority clearly ignored precedents of this Court. Although Respondents make a constitutional attack in federal court upon South Carolina's longstanding gambling forfeiture statutes, their federal claims are minimal and South Carolina's police power prerogatives are at a premium. In such instances, abstention is clearly applicable. *Burford, id.*

This case is, therefore, unlike decisions where abstention was inapplicable, such as *McNeese v. Bd. of Ed.*, 373 U.S. 668 (1963), a case involving freedom from racial discrimination – a "fundamental injury"– *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 661 (1987). Here, Respondents' federal challenges are raised in the

context of the South Carolina legislature's having declared in 1931 all gambling devices to be contraband *per se*. This Court recognizes the strong state interest in asserting "in rem jurisdiction over .... [such contraband] in order to conduct forfeiture proceedings, thereby fostering the public interest in preventing continued illicit use of the property and in enforcing criminal sanctions...." And, in these circumstances, Due Process does not require a preseizure hearing. *Calero-Toledo v. Pearson Yacht Co.*, 416 U.S. 663, 679 (1974).

Indeed, over one hundred years ago, the Court held that seizure and destruction of a legislatively declared "public nuisance," such as gambling instrumentalities, may be accomplished constitutionally by "summary" proceedings. *Lawton v. Steele*, 152 U.S. 133 (1894). *See also, North American Cold Storage Co. v. City of Chicago*, 211 U.S. 306 (1908) [summary seizure of unfit food without prior hearing is valid]. As Justice Harlan concluded in *Booth v. Illinois*, 184 U.S. 425, 427 (1902), a statute regulating gambling is given considerable leeway unless constituting "a clear, unmistakable infringement of rights secured by the fundamental law."

More recently, the Court recognized that "gambling .... implicates no constitutionally protected right." *U.S. v. Edge Broadcasting Co.*, 509 U.S. 418, 426 (1993). *See also, AhSin v. Wittman*, 198 U.S. 500, 505 (1905) [anti-gambling legislation enforceable unless clearly violating fundamental law]; *Stone v.*

Mississippi, 101 U.S. 814, 821 (1879) [lotteries "disturb the checks and balances of a well-ordered community."] Furthermore, in *United States v. Korpan*, 354 U.S. 271 (1957), this Court completely rejected any claim that the phrase "involved an element of chance" – as used in the federal criminal statute requiring the payment of an occupational tax upon "so-called 'slot machines'" – was unconstitutionally vague. Respondents make similar vagueness contentions regarding the South Carolina forfeiture statutes which ban all devices "pertaining to games of chance." In short, the majority in disregarding these precedents, leaves South Carolina's gambling statutes under the cloud of federal court intervention.

II. The Majority Failed To Consider *Holliday v. State*, 335 U.S. 803 (1948), A Summary Decision Upholding South Carolina's Predecessor Gambling Forfeiture Statutes As Constitutionally Valid.

That Respondents' constitutional claims are negligible is demonstrated by the fact that similar claims regarding a similar version of the South Carolina statutes have been summarily rejected by this Court. In *Holliday v. State*, 335 U.S. 803 (1948), affirming 78 F.Supp. 918 (W.D.S.C. 1948), the plaintiff contended, as Respondents do, that South Carolina's gambling forfeiture statutes are

> unconstitutional, null and void, and in violation of the Fourteenth Amendment of the United States Constitution, because the statutes treat, embrace,

> regard and include the said coin operated amusement machines of the plaintiff as gambling devices *per se*, and subject them to seizure and destruction as gambling devices *per se* although they are inherently innocent ....

Pet. App. at a165. As in *Holliday*, Respondents allege that

> S.C. Code § 12-21-2710's prohibition against possessing any "device pertaining to games of chance of whatever name or kind" read literally outlaws most all amusement games, including board games like Monopoly©, a simple deck of cards or dice, and a host of electronic games found on most home computers and cell phones ....

Id. at a75. Yet, the three-judge court in *Holliday*, unpersuaded by plaintiff's "inherently innocent" arguments, rejected the claim that South Carolina's forfeiture statutes violate equal protection or due process, concluding that the predecessor to §§ 12-21-2710 and 12-21-2712 was a "valid exercise of the [State's] police power ...." 78 F.Supp. at 925. On appeal to this Court, South Carolina urged dismissal of the appeal or affirmance of the judgment below because "the [constitutional] questions on which the decision of the cause depends are so insubstantial as not to require further argument ... [in that] ... [t]he State of South Carolina has the right to declare the

machines in question to be gambling devices *per se*."[1] This Court obviously agreed; the judgment of the three-judge court, concluding that the statutes do not violate the Fourteenth Amendment, was summarily affirmed. 335 U.S. 803.

Here, Respondents, in their *Brief in Opposition*, ignore *Holliday* completely. By doing so, they tacitly acknowledge that *Holliday* renders their Due Process and Equal Protection attacks upon South Carolina's gambling forfeiture statutes to be, at best, tenuous, if not altogether insubstantial.

Thus, if the minimal federal interest in revisiting the constitutionality of South Carolina's anti-gaming scheme had been properly weighed against the overarching state interests in outlawing and condemning gambling devices, as this Court requires, see *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996), this case should have easily warranted *Burford* abstention. As Justice Kennedy wrote in concurrence in *Quackenbush*, "principles of equity thus are not the sole foundation of abstention rules; obligations of comity and respect for the appropriate balance between federal and state interests, are an important part of the justification and authority for abstention as well." *Id.* at 733-734 (Kennedy, J. concurring). Accordingly, even if no "'difficult questions of state law'" are raised by this case, (we argue in our Petition, however, see, pp. 18-19, n. 5,

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[1] Copy of State's Motion to Dismiss or Affirm in *Holliday* recently obtained from United States Supreme Court Library.

that such state law questions abound), this is, nevertheless, a situation "'where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" *New Orleans Publ. Serv. Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989) (*NOPSI*), quoting *Colorado River Water Conserv. Dist. v. U.S.*, 424 U.S. 800, 814 (1976). In view of the obvious disruption of South Carolina's strong anti-gambling policy, *Burford* abstention should have applied.[2]

III. The Majority Also Failed To Consider Decisions Of This Court Where Abstention Was Appropriate Notwithstanding Constitutional Challenges To The State's Regulatory Scheme.

However, Respondents urge, and the majority adopted, a "facial challenge" exception to *Burford* abstention, one which would, in the words of dissenting Judge Wilkinson, "... render *Burford* abstention virtually inapplicable to all constitutional challenges in federal court to specialized regulatory schemes." *Pet. App., supra* at a28. (Wilkinson, J. dissenting). In

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[2] Respondents misread the alternative two-pronged requirement of *Burford*, as set forth in *NOPSI*. *Burford* is not, as Respondents claim, rendered inapplicable by their "facial challenges which do not involve interpretation of difficult questions of state law." *Brief In Opposition* at 1. The Court must also look to the disruption of South Carolina's clear anti-gambling policy.

essence, so long as a plaintiff's challenge to a regulatory scheme is characterized as a "facial" attack upon the scheme itself, the majority would conclude that such claims virtually eliminate *Burford* abstention and entitle plaintiff's case to proceed in federal court. The majority relied largely upon *Bath Mem. Hosp. v. Maine Health Care Finance Commission*, 853 F.2d 1007 (2nd Cir. 1988), decided before *NOPSI*, which concluded that *Burford* "rested upon the threat to the proper administration of a *constitutional* state regulatory system." 853 F.2d at 1013. (emphasis in original). The majority panel thus not only disregarded, but rewrote, *Burford's* second prong, articulated in *NOPSI*, finding that if Respondents are successful in their constitutional claims, they would be entitled to have enjoined "all enforcement of the statutes at issue ...." Accordingly, found the majority, "such relief could not possibly threaten their uniform application." *Pet. App., Id.* at a15.

Respondents attempt now to claim that the majority decision created no exception to *Burford* for "facial" challenges to the State's regulatory scheme. *See, e.g. Brief In Opposition, supra* at 1. Yet, Respondents at the same time contend that their claims "are based solely upon a constitutional challenge to the State of South Carolina's settled application of S.C. Code §§ 12-21-2710 and 12-21-2712 ...," thereby rendering *Burford* inapplicable. *Id.* at 6. Such an analysis clearly seeks a *Burford* exception for constitutional challenges to the regulatory scheme, as the majority here created. As noted above, no less authority on abstention than

Judge Wilkinson certainly thought the majority created such an exception to *Burford*, one which essentially swallowed the rule.

Therefore, as Judge Wilkinson explained, the majority's reasoning was clearly wrong and a marked departure from this Court's decisions. Over the years, the Court has frequently observed that the principles of abstention and comity are not rendered inapplicable when plaintiff seeks to challenge the constitutionality of the State's regulatory scheme. In *Fenner v. Boykin*, 271 U.S. 240, 243 (1926), for example, the Court distinguished *Ex Parte Young*, 209 U.S. 123 (1908), relied upon so heavily by Respondents. *Fenner* indeed noted that, consistent with *Young*, in certain extraordinary instances, "[c]ourts of the United States have power to enjoin state officers from instituting criminal actions." Ordinarily, however, "there should be no interference with such officers ..." and the "accused should first set up and rely upon his defense in the state courts, *even though this involves a challenge to the validity of some statute*, unless it plainly appears that this course would not provide adequate protection." (emphasis added). *See also*, *Watson v. Buck*, 313 U.S. 387, 400 (1941) ["(f)ederal injunctions against state criminal statutes, either in their entirety or with respect to their separate and distinct prohibitions, are not to be granted as a matter of course, even if such statutes are unconstitutional."]; *Spielman Motor Sales v. Dodge*, 295 U.S. 89, 95 (1935) [same].

The Court's invocation of comity – even where there is a constitutional challenge to a state statute – is not confined to criminal enforcement, however. Subsequent decisions involving challenges to the constitutional validity of state tax systems are also particularly instructive. For example, in *Fair Assessment In Real Estate Assoc., Inc. v. McNary*, 454 U.S. 100, 116 (1981), the Court, relying upon cases such as *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny, as well as *Great Lakes Dredge and Dock Co. v. Huffman*, 319 U.S. 293 (1943) and *Matthews v. Rodgers*, 284 U.S. 521 (1932), concluded:

> [t]herefore, despite the ready access provided by *Monroe* [*v. Pape*, 365 U.S. 167 (1961)] and its progeny, we hold that taxpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts. Such taxpayers must seek protection of their federal rights by state remedies, provided of course that those remedies are plain, adequate, and complete ... and may ultimately seek review of the state decisions in this Court.

Moreover, in *Moore v. Sims*, 442 U.S. 415 (1979), the Court rejected the view which the majority assumed to be operable here, that the doctrine of

abstention (in this instance *Younger* abstention)[3] could not be applied where the state procedures themselves were being constitutionally challenged. *Moore* stated that any "argument that a constitutional attack on state procedures automatically vitiates the adequacy of those procedures for purposes of the *Younger-Huffman* line of cases is reiteration of a theme sounded and rejected in prior cases." *Id.* at 426, n. 10. In the Court's view, "[t]he pertinent issue is whether appellees' constitutional claims could have been raised in the pending state proceedings." *Id.* at 425. Further, the *Moore* Court emphasized:

> [t]he breadth of a challenge to a complex state statutory scheme has traditionally militated in *favor* of abstention, not against it. This is evident in a number of distinct but related lines of abstention cases which, although articulated in different ways, reflect the same sensitivity to the primacy of the State in the interpretation of its own laws and the cost to our federal system of government inherent in federal-court interpretation and subsequent invalidation of parts of an integrated statutory framework.

And, in *Trainor v. Hernandez*, 431 U.S. 434, 439

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[3] The *Younger* line of cases is recognized as "a variant of *Burford*-type abstention." 17A C. Wright, A. Miller, and E. Cooper, *Federal Practice and Procedure*, § 4241. As this Court has stressed, abstention doctrines are not "rigid pigeonholes." *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 11, n. 9 (1987).

(1977), based upon *Younger* abstention, this Court reversed the conclusion of the District Court that the statutes in question "on (their) face [are] patently violative of the due process clause ...."

Similarly, *NOPSI* made clear that the applicability of abstention (there, *Younger* abstention) is not dependent upon the type of constitutional challenge mounted in the federal action. While *Burford* abstention was deemed inapplicable to the federal preemption claims involved in *NOPSI*, the Court proceeded to comment upon the argument that abstention is *automatically* inapplicable based upon the nature or type of claim made. In the Court's view,

> [t]here is no greater federal interest in enforcing the supremacy of federal statutes than in enforcing the supremacy of explicit constitutional guarantees, and constitutional challenges to state action, no less than preemption-based challenges, call into question the legitimacy of the State's interest in its proceedings reviewing or enforcing that action. Yet it is clear that the mere assertion of a substantial constitutional challenge to state action will not alone compel the exercise of federal jurisdiction.... That is so because when we inquire into the substantiality of the State's interest in its proceedings we do not look narrowly to its interest in the *outcome* of the particular case – which could arguably be offset by a substantial

> federal interest in the opposite outcome. Rather, what we look to is the importance of the generic proceedings to the State....

Id. at 365-366.

Moreover, in his concurring opinion in *NOPSI*, Chief Justice Rehnquist made it clear that even with regard to the preemption claim present, *Burford* abstention would not necessarily be rendered inapplicable by such claim. The Chief Justice noted that he "... would not foreclose the possibility of *Burford* abstention in a case like this had the State consolidated review of the orders of local rulemaking bodies in a state court with power to hear a federal pre-emption claim." 491 U.S. at 361. His view is consistent with the correct rule to be applied here: *Burford's* applicability is not defeated solely by the presence of a "facial" attack upon South Carolina's gambling forfeiture statutes.

Strikingly, even aside from the aforementioned cases, the *Holliday* decision makes this case one which is quite similar to *Alabama Pub. Serv. Comm'n. v. Southern Ry. Co.*, 341 U.S. 341 (1951). Like the statutes in question in the case at hand (which were previously deemed constitutional in *Holliday*), the statute involved in *Alabama Pub. Serv. Comm.* had also theretofore been upheld by this Court. See, *St. Louis-San Francisco R. Co. v. Alabama Public Serv. Comm.*, 279 U.S. 560 (1929). Nevertheless, Plaintiff in *Alabama* attacked the statute by challenging the order issued pursuant thereto as unconstitutional. Indeed,

Appellants there contended that the case involved "a suit to restrain state officials from enforcing unconstitutional state laws" and was thereby prohibited by the Eleventh Amendment. *Id.* at 344, n. 4. This Court concluded, however, that based upon its previous ruling, the statute was constitutionally valid, against a Commerce Clause and Due Process challenge, see 279 U.S. 560. Thus, the subsequent case was not one "in which the constitutionality of a state statute is drawn into question," 341 U.S. at 344, and n. 5. Accordingly, *Burford* controlled. The parallels between *Alabama Pub. Serv. Comm.* and this case are thus striking. *See also, Martin v. Creasy*, 360 U.S. 219 (1959) [citing *Alabama Pub. Serv. Comm; supra* with approval].

IV. Contrary To Respondents' Assertions, There Is A Split of Authority Among Lower Federal Courts Regarding Application of *Burford*, Thus Warranting Review By This Court.

Accordingly, the majority misapplied this Court's precedents and even ignored them. Had those precedents been followed, the majority would have affirmed the District Court's decision to abstain under *Burford*. Contrary to Respondent's contentions, *see Brief In Opposition* at 11, the State's statutory forfeiture scheme gives them an adequate opportunity to raise any constitutional claims the may have. As shown in our *Petition*, pp. 6-7, this state procedure has addressed numerous federal constitutional claims regarding the process over the years. Moreover, with

respect to Respondents' claim that we have identified no "split in authority," *Brief In Opposition* at 1, both Judge Wilkinson, in his dissent, *Pet. App. a25* - a26 (lower courts "rife in conflicting approaches" to *Burford*) and Petitioners in our *Petition* (pp. 25-29) amply demonstrate the conflict regarding *Burford's* applicability.

The words of Judge Wilkinson are especially worthy of reflection by this Court in this case. In dissent, he wrote that "[t]he majority deprives the state of significant measures of control, over issues touching not simply the pros and cons of gambling, but the very tone and quality of life within state borders. *Pet. App.* at a50. Abstention was designed to protect such important state interests.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted. The Court may wish to summarily vacate the majority's decision below.

Respectfully submitted,

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